

**PUBLIC INTEGRITY COMMISSION
MINUTES
March 19, 2019
10:00 A.M.**

1. Call to Order: 10:00 a.m. Present: Bonnie Smith (Chair); William F. Tobin, Jr. (Vice-Chair), Michele Whetzel (Vice-Chair); Commissioner Manus; Commission Counsel, Deborah J. Moreau, Esq.

2. Approval of Minutes for February 19, 2019: Moved—Commissioner Manus; seconded—Commissioner Tobin. Vote 4-0, approved.

3. Administrative Items

- A. The Delaware Supreme Court decided *Abbott v. PIC* affirming the Commission's decision.
- B. Legislation: ID cards; confidentiality statute.
- C. Annual report and opinion synopses updated on the PIC website.
- D. Annual Financial Disclosure filing—346 filed; 14 delinquent

4. Motion to go into Executive Sessionⁱ to Hear Requests for Advisory Opinions, Waivers and Referrals: Moved—Commissioner Manus; seconded—Commissioner Whetzel. Vote 4-0, approved.

******Commissioners Anderson and Gay Arrive******

5. 19-09—Outside Employment

[Employee] is an Administrative Assistant II for [a] Division of [a State agency]. She was assigned to work at [a particular inpatient location]. [Employee] performed general office manager duties, supervised a casual/seasonal employee and prepared contracts between [the Division] and outside vendors; maintained and audited client information in an electronic database. Her work hours were 8:30 a.m. to 4:30 p.m.

[Employee] had been offered a part-time position with [one of her Division's vendors]. [Vendor] did not provide services to the [inpatient location where Employee worked]. [Vendor] provided services to clients [living in the community]. As part of her job duties, [Employee] would assist clients with [various tasks]. She asked for her work hours to be after 5 p.m. and on weekends. The Commission had previously approved [Division] employees to work for [Vendor] in a variety of positions. (*Comm. Ops. 16-46; 16-22; 15-17; 14-31; 14-28*).

[Employee] asked the Commission if her part-time work with [Vendor] created a conflict of interest with her State job duties.

APPLICATION OF THE FACTS TO THE LAW

A. Under 29 Del. C. § 5806(b), State employees may not accept other employment if acceptance may result in:

(1) impaired judgment in performing official duties:

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employees state] clients did not live in the community. Therefore, it was extremely unlikely that [Employee] would encounter one of [her state] clients while performing her part-time job duties. As a result, there was no concern that her official judgment could be affected by her part-time work. At the meeting, [Employee] mentioned that one of her State job duties was to audit all of [Division]'s client records to assure that they were accurate. This could have involved her auditing one of her [part-time] client's records. However, her audit work was limited to verifying demographic information. Such work is considered ministerial. A matter is "ministerial" when the duty is prescribed with such precision and certainty that nothing is left to discretion or judgment. *Commission Op. No. 00-18 (citing Darby v. New Castle Gunning Bedford Education Assoc., 336 A.2d 209, 211 (Del., 1975))*. Because her official duties regarding the record database were assigned with certainty, with no room to deviate, a conflict would not arise because her judgment would not be impaired.

(2) preferential treatment to any person:

The next concern addressed by the statute is to insure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [Employee] could not represent or assist her private interest before her own agency. 29 Del. C. § 5805(b)(1). [Vendor] was a [Division] contractor but they did not work with clients at [the inpatient location where Employee performed her State job duties]. The Commission did not see how [Employee's] work with community-based clients would give her the ability to show preferential treatment to anyone.

(3) official decisions outside official channels:

There were no facts to suggest that [Employee] would make official decisions outside official channels. That was not to say she would do so, she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

(4) any adverse effect on the public's confidence in the integrity of its government:

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

Because [Employee] would not have contact with [clients from her State job location] while performing her [part-time] job duties, and vice-versa, the Commission decided that her dual roles were unlikely to create an appearance of impropriety.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the outside employment would be contrary to the restrictions on misuse of public office. 29 *Del. C.* § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] asked [Vendor] for work hours outside of her State work hours.

Motion-No conflict of interest between [Employee]’s State job duties and the job duties at [Vendor]. Moved—Commissioner Manus; seconded Commissioner Whetzel. Vote 6-0, approved.

6. 18-54—Private Interest

[Employee worked for a State agency updating digital data]. The information is shared on a public website which is hosted by the Department of Information and Technology (“DTI”). He also worked with counties and municipalities by providing some information that was part of the digital data to aid the county and municipal entities for use in their planning and decision-making processes. The State provided those services for free.

[Employee] wanted to bid on contracts with non-State government entities to provide [the same services he performed for the State]. As an example, [Employee] referenced a project in [a town] which involved updating and improving the [information used by the public when visiting the town]. When providing those services he would need to access [the database he worked with at his State job] to gather necessary data. Another example of potential clients would be non-profit entities. [Employee] stated in his written submission that he would perform the work outside of his State work hours, on his own computer and using his own software.

[Employee] asked the Commission if his work on private contracts would create a conflict of interest with his State position.

1. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 *Del. C.* § 5805(a)(1).

A personal or private interest in a matter is an interest which tends to impair a person’s independence of judgment in the performance of the person’s duties with respect to that matter.” 29 *Del. C.* § 5805(a)(1). As a matter of law, a person has a personal or private interest if any decision “with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent” than others similarly situated or if “the person or a close relative has a financial interest in a private enterprise which would be affected” by a decision on the matter to a greater or lesser degree than others similarly situated. 29 *Del. C.* § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” 29 *Del. C.* § 5805(a)(2). Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe*

Medical Center v. Certificate of Need Appeals Board, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

The Commission asked [Employee] if the State had ever considered providing additional services to municipalities free of charge. He stated that he was not aware of any such consideration. The Commission was concerned that the proposed contractual service could be a service the State would be willing to provide to the municipalities for free. The State already gathered data in areas that were in, or close to, a municipality. As a result, some of the data could have already been in the State database and extending that data to include municipal data may not have required the State to incur additional expenses to provide to others at no cost. Considering the fact that the State was willing to provide [some data] at no cost, the Commission did not want to assume that the State would refuse to provide additional municipal services if asked.

The Commission did not consider whether [Employee] could provide [data] services for non-profit entities because he did not have any specific entities in mind. The Commission must be able to compare the law to the facts and in the case of non-profit entities, there were not enough facts upon which to base an opinion.

2. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).

The purpose of the code is to insure that there is not only no actual violation, but also not even a “justifiable impression” of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official’s duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23* and *97-42*. Those circumstances should be examined within the framework of the Code’s purpose which is to achieve a balance between a “justifiable impression” that the Code is being violated by an official, while not “unduly circumscribing” their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

[Employee] worked with municipalities and counties as part of his State job duties. The Commission was concerned that his dual roles, working for [the town] and working for the State on [town] projects, would create an appearance of impropriety among the public that he was using his State position for personal gain. That was bolstered by the fact that [Employee] was made aware of the [town] project because [a member of a town committee], that he had previously worked with at his State job, approached him and asked if he would be interested in bidding on the contract. Not only did his State job bring him into close contact with members of municipal government entities, he would have advance knowledge about their projects through the [data] work that he already performed. If he were to perform consulting work for the municipalities he worked with in his State job, the blurring of the boundaries between his two roles could lead the public to believe that he was using his State position and/or contacts to benefit his private consulting business. The Commission advised [Employee] that he could work on out-of-state projects because they would not create a conflict of interest with his State position.

Motion—[Employee]’s proposed consulting work would create a conflict of interest with his State job duties. Moved—Commissioner Manus; seconded—Commissioner Gay. Vote 6-0, approved.

******Commissioner Gonser Arrived******

7. 19-04 & 19-05—Private Interest

[Employee 1] worked for a Division of [a State Agency]. [Employee 1] was assigned to work at [a school], where she worked with children and their parents [that were within a specific age range]. [Employee 1] provided case management and counseling services to the children and acted as an advocate for the parents within the school.

[Employee 2] worked for [a different] Division within the [Agency]. [Employee 2] worked with youth at [a residential facility near the Division’s physical location]. [The] residential [facility] only accepted youth within a specific age range, with specific needs]. [Employee 2]’s duties included managing a caseload and providing services to youth and their families.

When asked about their access to [an Agency] database, [Employee 1] and [Employee 2] both stated that they could only access information that was pertinent to their State job duties and denied having access to information about [other facilities or clients that were not part of their caseload].

[Employee 1] and [Employee 2] planned to purchase a [private business]. [The business] would [serve very young children]. [Employee 1] and [Employee 2] stated that the [business] planned to accept [clients that received state subsidies]. The [businesses that accept state subsidies] are licensed and regulated by [a third] division within [the Agency].

[Employee 1] and [Employee 2] asked the Commission whether their co-ownership of the [business] would create a conflict of interest with their State job duties.

A. State employees may not review or dispose of State matters if they have a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1).

[Employee 1] and [Employee 2] would have a private interest in the [business] through their co-ownership of the facility. They planned to accept clients that [received state subsidies]. Clients applying for [the subsidies] go through an application process where their income is evaluated to determine if they are eligible for aid. If eligible, the client would be provided with a list of [participating businesses] (including the facility to be purchased by [Employee 1] and [Employee 2]) and are told to choose one. Thereafter, [a separate state agency] directly reimburses the [business] for the client’s expenses.

[The business] would be monitored and regulated by a separate division within [Agency]. [Employee 1] and [Employee 2] did not work in the Division responsible for regulating and licensing the [business]. Nor did they work for [the Agency] that presented the [subsidized] clients with a list of eligible [businesses]. Unlike previous applicants, [Employee 1] and [Employee 2] had more separation between their State job duties and the agencies they would be required to work with as co-owners of [the business]. When determining if their dual roles created a conflict of interest, the Commission relied heavily on their assertion that they could not access records related to [similar businesses] or the clients of any particular [business]. If that

information turned out to be otherwise, the letter opinion would be null and void because the Commission could only offer an advisory opinion if “there was a full disclosure to the Commission or Commission Counsel of all material facts necessary for the advisory opinion”. 29 Del. C. § 58079(c).

As to [Employee 1], the [business] was in the same geographic area as the school where she performed her State job duties. The Commission was concerned that she may encounter her [business’s] clients while performing her State job duties and vice-versa. When the Commission inquired about that possibility, [Employee 1] responded that although [the business and the school] were in the same county, they were not physically located in close proximity to one another. The geographic separation reduced the likelihood that [Employee 1] would encounter one of her [business’s] clients while performing her State job duties. Adding more separation between her two roles, she pointed out that [the business would not serve the same age group as those she worked with in her State job]. That fact also alleviated a concern that she would refer her State clients to [her business].

[Employee 2] did not work in the Division responsible for regulating and licensing the [business]. While she worked near the [Agency] campus, [her State job location was] separated from the main office space. She pointed out that [the business] would serve children [of a different age demographic as those she worked with in her State job]. As a result, there was no concern that she would refer her State clients to [her business].

B. State employees may not represent or otherwise assist a private enterprise on matters before the agency with which they are associated by employment. 29 Del. C. § 5805(b)(1).

State employees are not to deal with their own agency to insure decisions by their colleagues and coworkers are not unduly influenced by another employee’s connection to the private enterprise.

Delaware Courts have addressed the concern when that occurs. *W. Paynter Sharp & Son, Inc. v. Heller*, 280 A.2d 748, 752 (Del. Ch., 1971). In that case, an appointee to DNREC’s Fish and Wildlife Advisory Council, which was under the Fish and Wildlife Division, sought to contract with the Division on matters where the Division had specific authority and responsibility. *Id.* at 751. The Cabinet Secretary declined to contract with him, even though the contract was publicly noticed and bid, and even though he was the lowest bidder. *Id.* at 750-751. The Secretary was concerned about the close association between the appointee and the Division and wanted to “avoid any allegation or suggestion of undue influence in the letting of contracts by this Department.” *Id.* at 750. The Court noted at that time that the State had no specific conflict of interest law. *Id.* at 751. It also noted that there was nothing in the record to show that the State official secured the contract as the result of anything other than submitting the lowest responsible bidder, but it approved the Secretary’s action saying: “the award of contracts for public works has been suspect, often because of alleged favoritism, undue influence, conflicts and the like” and “it is vital that a public agency have the confidence of the people it services and, for this reason, it must avoid not only evil but the appearance of evil as well.” *Id.* at 752. Three years later, a Code of Conduct was passed that included the bar against State employees, and appointees to an agency’s Boards or Commissions, dealing with their own agency, and it was deemed as one of the provisions the General Assembly found “to be so vital” that it carries a criminal penalty. 29 Del. C. § 5805(f).

The Commission has always interpreted this provision with an eye towards the size of the applicant's employing agency and the number of divisions within its purview. That is so the Commission's opinions would be consistent with the legislature's desire to encourage citizens to assume public employment and "therefore, the activities of...employees of the State should not be unduly circumscribed." 29 Del. C. § 5802. [Employee 1] did not work on the [Agency's] campus so she was physically separated from those State employees who could make decisions or recommendations about the [business]. Therefore, the limitation imposed by the conflict of interest statute was mitigated because it was unlikely that she had the type of close relationships with co-workers in other Divisions than the type of relationships contemplated by the statute.

[Employee 2] did work near the [Agency's] campus but she was physically separated from those State employees who could make decisions or recommendations about the [business]. Therefore, the limitation imposed by the conflict of interest statute was mitigated because it was unlikely that she had the type of close relationships with co-workers in other Divisions than the type of relationships contemplated by the statute.

C. State employees are to pursue a course of conduct which will not raise suspicion among the public that they are engaging in acts in violation of the public trust and which will not reflect unfavorably upon the State. 29 Del. C. § 5806(a).

This is basically an appearance of impropriety test. The test is if the conduct would create in reasonable minds, with knowledge of all relevant facts, a perception that an official's ability to carry out duties with integrity, impartiality and competence is impaired. *In re Williams*, 701 A.2d 825 (Del., 1997). Actual violations of the Code of Conduct are not required; only the appearance thereof. *Commission Op.* No. 92-11; 63C Am. Jur. 2d Public Officers and Employees, 252 (actual conflict is not the decisive factor; nor is whether the public servant succumbs to the temptation; rather it is whether there is a potential for conflict).

As long as [Employee 1] and [Employee 2]'s job duties did not change and they did not encounter the same clients while performing the work duties of either position, it was unlikely that their ownership of [the business] would create an appearance of impropriety.

Under this provision, the Commission considered whether it would be perceived that an official was using public office for personal gain or benefit, which is barred by the Code. 29 Del. C. § 5806(e).

The [Division responsible for licensing and regulating their business] was only open during [Employee 1] and [Employee 2]'s State work hours. It was their responsibility to address regulatory and licensing issues without using their State time and resources to do so. In addition, they could not use their State time to send or receive phone calls, emails or perform other administrative work related to the [business].

Motion—[Employee 1] and [Employee 2]'s State job duties did not conflict with their ownership of the [business]. Moved—Gonser; seconded Commissioner Gay. Vote 7-0, approved.

8. 19-07—Outside Employment

[Employee] worked for a [specific Division of a State Agency]. [Employee]'s duties included: referring clients for behavioral health services; documenting progress; completing case plans and reports; requesting residential treatment when necessary.

For the past eight years, [Employee] had also worked part-time for [one of her Agency's vendors]. [The vendor did not contract with her Division]. [Employee]'s duties included providing counseling and therapy; planning, designing and presenting educational material; documenting records.

[Employee] had a recusal strategy in place [when she was working for the vendor]. If a client was [referred to the vendor by her State Agency, the vendor would not assign her to work with that client]. If she had already been working with the vendor's client before the client was referred to her State Agency, then [the vendor would] reassign the case to another employee. At the time of her submission, [Employee] was working with a client who [had not been referred to her State Agency] when she first began working with him but was later assigned to [Employee's] Division. The vendor was unable to assign the client to another employee (as per the recusal protocol) because they were short-staffed and in the process of hiring new employees. At the meeting she reported that she did not see the client again and they were transferred to a new [employee] once the [vendor] had completed the hiring process.

[Employee] asked the Commission if her part-time work with [the vendor] created a conflict of interest with her State job duties.

A. Under 29 Del. C. § 5806(b), State employees may not accept other employment if acceptance may result in:

(1) impaired judgment in performing official duties:

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employee] did not review and dispose of matters related to [vendor] while performing her State job duties because her Division did not contract with [vendor]. When performing her [vendor] job duties, if one of her clients was [referred to her State Agency] the [vendor] was supposed to transfer the client to another employee. Of course, during the instance she described in her written submission, there were no available employees to whom the client could be assigned. The Commission asked [Employee] how often such a circumstance had occurred. She stated that in the eight years she had worked for the [vendor], this instance was the only occasion.

(2) preferential treatment to any person:

The next concern addressed by the statute is to insure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. Because [vendor] did not contract with [Agency], it was very unlikely that [Employee] would encounter a co-worker or colleague that could benefit in some way from her part-time job duties. As to preferential treatment of her clients, [her State Agency and the vendor served two different types of clients]. In the unlikely event that [Employee] was assigned a client at [Agency] that she had worked with while at the [vendor], she was advised to recuse herself from that client.

(3) official decisions outside official channels:

There were no facts to suggest that [Employee] would make official decisions outside official channels. That was not to say she would do so, she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

(4) any adverse effect on the public's confidence in the integrity of its government:

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 *Del. C.* § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

In [Employee]'s written submission she stated that she does not disclose the fact that she works for [Agency] to her clients or their families. In addition, she had a strong recusal strategy that practically eliminated the crossover between her two positions. Both of those factors mitigated the possibility that the public would perceive her dual employment as an impropriety.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the outside employment would be contrary to the restrictions on misuse of public office. 29 *Del. C.* § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] worked for [vendor] outside of her State work hours.

Motion—[Employee]'s part-time work at [vendor] did not create a conflict of interest with her State job duties. Moved—Commissioner Anderson; seconded—Commissioner Manus. Vote 7-0, approved.

9. 18-46—Conflict of Interest **(*Commissioners Gay, Tobin and Gonser recusing; Gay and Gonser leave the meeting*)**

[Member 1] is the President of [Entity 1]'s board. [Member 1] contacted the Public Integrity Commission ("PIC" or "Commission") on behalf of [Entity 1] and requested an advisory opinion in November 2018. In his email request, he stated that [a State Agency] had informed them that they should submit a request for an advisory opinion to determine if the dual loyalties of a majority of [Entity 1]'s Board created a conflict of interest. If so, they asked the Commission to determine if [Entity 1]'s conflict of interest provision was a suitable remedy to such conflict. [Member 1] was subsequently scheduled to appear on behalf of [Entity 1] at the November and December Commission meetings but asked for additional time to collect materials for the Commission to review. The January meeting was cancelled for lack of a quorum and although the Commission had a quorum for the February meeting, one of the four members present

would have had to recuse themselves from any matter involving [Entity 1], leaving the Commission without a quorum to consider the matter.

On February 6, 2019, [a State Agency] submitted its own request for an advisory opinion regarding [Entity 1] because they found the request submitted by [Member 1] omitted key facts which would be important to the consideration of the conflict of interest issue. In response, [Member 1] filed a reply to the [Agency's] letter.

Instead of having two separate meetings with [Entity 1] and [the Agency], the parties agreed to all attend one meeting so that there could be an open discussion and dialogue between the Commission members and the parties. That meeting took place at the PIC offices in Dover, Delaware on March 16, 2019.

FACTS

[Entity 1] was established in 2006, and was helped, in part, by a large donation from [a private organization]. [The organization] is a civic organization whose mission is to promote the ideals of education, philanthropy, civic responsibility, family and individual excellence through community service and volunteerism. Those laudable philosophies have influenced the atmosphere at [Entity 1] to create a unique experience, earning it a reputation as one of the best [Entity's] in Delaware.

[Entity 1]'s Bylaws were adopted in November 2004. The Bylaws specified that the Board must have no less than nine members, a majority of which (five) "shall be appointed and maintained at all times by the [organization]." Those five delegates were chosen by [the organization's] members at a private meeting with no public input. The remaining Board members were chosen by [a] committee who then presented the selected individuals to the [organization's chosen Board members] for a vote. The committee was made up of three members and was chaired by a non-[organization] member. However, of the two remaining members of the committee, one was an [organization] member and the other was a member of a sister group of [the organization]. Therefore, the only member of the committee that was not associated with one of the [private] organizations could always be outvoted by the other two members. As a result, [the organization] controlled the selection of the non-[organization] Board members, as well as the five [seats designated by the organization]. Even assuming that the committee could be impartial, the five seats allotted to [the organization]'s Board members gave them a majority of the votes at all times. After the appointment of Board members, one of the [organization's] five delegates was selected by [the organization] to be the President of the Board. [Entity 1]'s bylaws did contain a Conflict of Interest provision which required a Board member to disclose business and financial relationships while conducting Board business.

In 2010, [Entity 1] asked [the Agency]'s permission to expand its [services], which was approved. After the approval, the Board obtained [monies to purchase a very large property with a number of buildings]. [Entity 1] occupied three buildings in the complex. Another building [was leased to a separate business]. [Entity 1]'s Board intended to convert part of the remaining space into [a pet project].

[The pet project was intended to be] a stand-alone non-profit, established under the umbrella of [the organization]. [The pet project] was to be located in a building near [Entity 1]. At the time of the Commission meeting, almost \$100,000 in [Entity 1]'s funds had been used for the [pet] project. At the meeting, the transfer of the monies for [the pet project's] purposes was referred to as a "loan." When asked about copies of the loan documents (which would ordinarily

include the terms of the loan), [Member 1] stated he would provide those after the meeting. [Member 1] later emailed Commission Counsel and wanted the funds to be referred to as “tenant cultivation.” However, a review of [Entity 1]’s Board minutes and recordings showed that the Board never voted to “loan” the money to [the pet project] before the funds were actually appropriated. Nor was there a motion to use the money for “tenant cultivation.” Instead, during the July and August Board meetings there was discussion among the Board members about using [Entity 1]’s funds “as seed money” for the development of the [pet] project. During the September 2017, Board meeting the then-Board President [Member 2] informed the Board that money had already been moved out of [Entity 1]’s funds and assigned to a “cost center” dedicated to [the pet project], all without formal Board knowledge or approval. He also announced a temporary Board [for the pet project] had been created and the new five member board included [Member 2], [Member 1], and [Member 3] (all organization members) and two other individuals who were not associated with [Entity 1]. When asked at the Commission meeting about the status of [the pet project, Member 4] stated that the project was “dormant”. It did not appear that the \$100,000 had been repaid to [Entity 1].

At the meeting, [Member 1] stated that during FY 2019, [Entity 1] was budgeted to receive approximately \$14 million in State funds, \$651,000 in Federal funds and \$10 million in local funds. Although the monies are referred to as ‘local’ monies, because [the localities] are considered state entities, for purposes of the Commission’s review, they are also considered ‘state’ monies.

CONTROVERSIES

Parents and other members of [Entity 1]’s community had become increasingly upset over what they saw as [the organization]’s complete control of [Entity 1] and its finances.

A. [Member 2]

[Member 2] is a former [Entity 1] Board member and President. His term on the [Entity 1] Board ended on July 1, 2018. Five days later, the [Entity 1] Board began discussing “finding a job for [Member 2].” Prior to that discussion, documents provided to PIC show that in June and July 2018, a consultant billed [Entity 1] \$1,187.50 for emails to [Member 2], [Member 1] and [Member 5] regarding a job description for a new administrative position [at Entity 1]. This demonstrated that [Member 2], who was the person most people considered to be the presumptive candidate to fill the position, was part of the discussion to set the required qualifications for the job. In addition, [Member 1] and [Member 5], who also discussed the job description with the consultant, were part of the selection committee to fill that position. In August and September of 2018, and January 2019, the same consultant invoiced [Entity 1] for discussions with [Member 2], long after his term on the Board had ended. His presence at [Entity 1] and his discussions with the consultant raised questions as to how involved he was in creating the qualifications for the position to which he was the presumptive candidate.

B. The Vote

In 2018, [the Agency] recommended to the Board that they amend their voting procedures whenever a Board action involved [the organization]. The Board voted on the measure and it passed at the November 2018, board meeting. Two of the [organization]’s board members voted in favor of the supermajority vote. Within the next month, one of the [organization]’s Board members that voted in favor of the supermajority vote suddenly resigned. The other made a Point of Order at the December 2018, Board meeting stating that he did not

have enough time to consider his vote in favor of [the changed voting requirement] and wanted to raise the issue and nullify the vote. [Member 1], being the Board President, had discretion whether to allow the Point of Order, which he voted in favor of allowing. As a result, the voting change was rescinded. That move prompted the resignation of Board member [not affiliated with the organization]. Her resignation was closely followed by a vote of no confidence from the teacher's union.

C. The [event]

In February 2019, [the organization] hosted a fundraiser, ostensibly for [Entity 1]. Invoices for the event showed that everything was billed to [Entity 1], despite the fact that the invitations were from [the organization] (listed first and most prominently), [Entity 1] and [the pet project]. Payments for the event were originally made out of [Entity 1]'s state funds. For unknown reasons, the invoices were later changed to show they were paid out of [Entity 1]'s local funds. Invoices for the event included a \$1,171.70 bill for "Save the Date" cards, \$11,686.50 for invitations and a three minute video to be recorded at the [event]. The invoice showed that [the organization] paid \$3,000.00 towards the bill. However, the State of Delaware remittance voucher showed the payment on the invoice was made on behalf of [Entity 1] for the full \$11,686.50 amount. On [Entity 1]'s website under [one of the links] there was a video that was recorded at the [event] and was titled [in a way that would lead people to believe that Entity 1 was owned by the organization, which it is not]. The title of the video coupled with the fact that only members of the [organization] appeared in the video caused some members of the [Entity 1] community to question if the [event] was to raise the profile of the local [organization] or to benefit [Entity 1].

When questions were raised about the expense of creating a three minute video by the head of the teacher's union, [Member 1] responded that "the comments...[were] just another criticism of the efforts that [the organization] is making to try to improve [Entity 1]."

D. Conference

[Member 2] and [sister Member 1] attended conference hosted by the [organization] in July 2018, which was paid for by [Entity 1]. At the Commission meeting, [Member 1] stated that it was his decision to send them to the conference because he believed their attendance would benefit [Entity 1]. While at the conference they distributed information about [Entity 1] but the materials were also branded with [the organization's and the pet project]'s logos. The cost of the distributed materials was approximately \$3,891.68 and the expenses of the two attendees were \$1,597.59.

E. [Pet Project]

Approximately \$100,000 of [Entity 1]'s monies have been used for the [pet] project. That information was supported by copies of invoices, emails and voucher transactions. The monies had not been used simply for the conversion of the existing building for possible occupancy by a [a similar business] but included expenses related to the development and printing of a logo for the [pet project], contractual services for website development and expenses for [business] development. In short, the scope of the spending itself demonstrated the fact that the building was not merely being prepared for *any* occupant but specifically for the [pet project] proposed and developed by [the organization]. As to the spending of the insurance proceeds of \$100,000, an email dated April 27, 2018 between the financial adviser and [Member 2], demonstrated that \$8,908.94 of the insurance proceeds were not used for the repair of the

building damaged. Instead of depositing the excess insurance reimbursement into [Entity 1]'s funds (presumably, [Entity 1] paid the insurance premium) the money was put towards a contract between [the pet project and a vendor].

APPLICATION OF THE FACTS TO THE LAW

A. Jurisdiction

A State agency is defined as “any office, department, board, commission, committee...school district, board of education and all public bodies existing by virtue of an act of the General Assembly...” 29 Del. C. § 5804(11). [Entity 1] is considered a State entity. As a result, the Board members are considered state employees. As a result, [Entity 1] Board members were subject to the State Code of Conduct.

B. Answers to [Entity 1]'s Request:

1. Are there any potential risks and/or conflicts of interest with having [Entity 1] Board members who are also members of the [organization]?

The Commission decided that there was not only the *potential* for conflicts of interest when a majority of the Board belonged to the *same* organization but that the conflicts were real and they were alarming. Equally troublesome was the fact that the Board had been unwilling to acknowledge the conflicts and those individuals that were seen as “not playing along” were targeted as unwilling to be a team player or not working in the best interests of [Entity 1]. The applicable provisions of the State Code of Conduct are set forth and discussed below.

2. Are the procedures adopted by the [Entity 1] Board in its bylaws and policies sufficient to address any potential conflict of interest associated with having members of [the organization] on the Board?

Absolutely not. While the Board attempted to ameliorate the effect of an [organization]-controlled Board by adding a conflict of interest provision to the Bylaws, it was ineffective because the [organization]'s Board members appeared to be blind to the fact that [the organization] was a private interest that conflicted with their Board duties.

As stated above, there were many examples of decisions that were made by the Board where [the organization]'s Board members had considered their private interest alongside, or above, their duty to the State agency, [Entity 1]. While they may have felt entitled to their [organization] bias because [Entity 1] was their idea and they donated some of the money to get it running, once they accepted State funds, they became subject to the State Code of Conduct. The composition of the Board itself was made with [the organization]'s goals in mind, that is why they have a majority of the seats. Not only did [the organization] control the majority, they had a major role in the selection of the non-[organization] members who were proposed by a committee which also had [organization] members.

The “loan” from [Entity 1] to [the pet project] was a glaring example of the problems created when an official has a private interest. [The pet project was] an [organization] project and not part of [Entity 1]. However, [Entity 1]'s funds, part of the insurance proceeds, and monies raised at the [event] were used to advance [the organization]'s goals. [Entity 1] paid for a majority of the [the event]'s expenses but the proceeds were to be divided between [Entity 1]

and [the pet project]. Even the head of [Entity 1] expressed concern about [Entity 1] funds being used for [the event that was] intended to benefit outside interests. In an email dated December 4, 2018, she told [Member 1] that she had misgivings about using \$12,000 of [Entity 1]'s operating funds to the benefit of [the pet project]. She also shared her concerns about how the public would perceive \$8,000 being spent on invitations and gifts. In response, [Member 1] did not reference the Bylaws and the conflict of interest provisions designed to protect against such transactions. The conflict of interest provisions in both the Bylaws and the State Code of Conduct are more than written words. They are intended to serve a purpose, but are only effective if actually implemented.

Other instances which demonstrated an unpermitted co-mingling of [the organization]'s and [Entity 1]'s interests, which should have been prevented by the Bylaws included:

- a. The [organization] was prominently displayed on the invitations to the [event].
- b. The [organization]'s activities, including [the pet project], were promoted by discussing them during Board meetings (sometimes for longer than actual [Entity 1] business) and including them in the meeting minutes.
- c. [Entity 1] spent \$1597.59 to send [Member 2] and [sister Member 1] to the [organization]'s convention in July 2018. That may have been a viable fund-raising effort but the taint of the comingled interests overshadowed any legitimate purposes.
- d. The [large property] was purchased with an eye towards expanding the [organization's long-term plans]. However, [Entity 1] will pay the monies on the facility until the buildings are suitable for tenants. Some work on the building to be occupied by [the pet project] had already been completed, including the installation of signage and a travertine tile floor. Part of it was paid for with proceeds from an insurance claim and the remaining \$13,691.06 was paid by [Entity 1].
- e. Thousands of dollars for promotion of [Entity 1] (and the [organization]) at the [organization]'s convention in July 2018.

The State Code of Conduct's prohibition against engaging in conduct which may raise an appearance of impropriety, as do all the forgoing examples, is set forth below.

B. Answers to the [Agency's] Request

On behalf of [the Agency], [State official 1] asked the Commission to consider:

1. Did [Entity 1] incur an obligation or interest that substantially conflicts with their public duty? Is it proper for [the organization] to appoint the President of the Board?

Yes, under this set of facts, having multiple members of the Board belonging to the *same* organization resulted in an interest that conflicted substantially with their public duties. The [organization] could continue to appoint the President of the Board because the appointment represented only one vote of the entire Board. However, the President had to be one of the [organization]'s designated Board members. (i.e. [organization] could not increase the number of Board

members by appointing the maximum number of [organization] designees and then also appointing an [organization] President).

2. Did the Board violate the following: No State Officer may represent or otherwise assist a private enterprise with respect to any matter before the State?
Translated by the Commission to mean: No Board member may represent or otherwise assist any private enterprise with respect to any matter before the Board.

No, [the organization] is not a private enterprise. It is considered a private interest under the conflict of interest provisions of the State Code of Conduct. However, there was an argument that some members of the Board did act on behalf of [the pet project] (which would qualify as a private enterprise). See below.

3. Did the Board violate the prohibition against acquiring a financial interest in a private enterprise that may be directly involved in the [Board]'s decisions?

Yes, acquiring the interest in [the pet project] via their participation in the [organization] violated the statute when the [organization]'s Board members allowed monies to be taken out of [Entity 1]'s accounts and transferred to [the pet project's] cost center or was paid directly to vendors in support of [the pet project].

4. Did the Board's conduct raise suspicion that the public's trust was being violated?

Yes, ever since the Board raised the idea that they were going to create another administrative position, members of [Entity 1]'s community have been incensed by the amount money that seemed to flow out of [Entity 1] to the benefit of those affiliated with [the organization]. See below for further discussion.

5. Did the Board violate the provision against accepting other employment, compensation...if it may result in any adverse effect of the public's confidence in its government?

No, this provision of the Code of Conduct assumes that a person is already a state employee when they accept additional employment. [Member 2] was not an employee of [Entity 1] at the time he began advocating for [the pet project].

Because most of the attendees at the Commission meeting seemed unfamiliar with the State Code of Conduct, the Commission applied the facts of this matter to the State law.

C. The State Code of Conduct

1. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).

“A personal or private interest in a matter is an interest which tends to impair a person’s independence of judgment in the performance of the person’s duties with respect to that matter.” 29 Del. C. § 5805(a)(1). A personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*.

[Member 1] claimed that the statute only applied to financial interests and since he, or [Entity 1], had no financial interest in [the organization], this provision of the Code of Conduct was inapplicable. However, his interpretation of the statute was incorrect. The General Assembly never intended for the statute to be limited to *only* financial interests.

When drafting the Code of Conduct, the General Assembly used the term ‘financial interest’ when it wanted the provision to be applicable to only those interests, which has a very precise statutory definition. See 29 Del. C. § 5806(c) (*no state employee, officer or honorary official shall acquire a "financial interest..."*); See 29 Del. C. § 5804(5) (definition of “financial interest”). In other instances it makes no reference to financial interests. See 29 Del. C. § 5806(b) (*no state employee, officer or honorary official shall have any interest in any private enterprise nor shall [they] incur any obligation of any nature which is in substantial conflict with the proper performance of such duties in the public interest*) (emphasis added). If the General Assembly had meant for all of the restrictions to be limited to financial interests, it clearly could have done so. Moreover, to read the Code as limited to pecuniary or financial interests would ignore the broader statutory language such as “any interest” have no meaning. The rules of statutory construction require that all words and phrases be given meaning. *Goldstein v. Municipal Court*, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991).

It is also clear under the Delaware common law that conflicts of interest for public officials may arise as a result of more than just pecuniary interests. See *Shellburne, Inc. v. Roberts*, Del. Super., 238 A.2d 331 (1967) (*complaint alleged "personal interest," "conflict of interest," and "use of public office in the furtherance of such personal interest or conflict of interest," because public official allegedly based his decision on other than the merits because he was motivated by: (1) his desire to assist his coreligionists; (2) the close attorney-client and business relationship between the official and the attorney for the civic association which wanted rezoning; and (3) his colleague, whose wife was a member of the Church*). The concern under the common law restriction on public officials participating in decisions where they have a personal or private interest is the same as would arise under the State Code prohibition which restricts such officials from “reviewing and disposing of matters in which they have a personal or private interest that tends to impair independence of judgment.” 29 Del. C. § 5805(a)(1). That concern is that decisions be based on a “fair and unadulterated examination of the merits” and that “any conduct giving the appearance that impropriety is involved therein should be studiously avoided.” *Kulesza v. Star Services Inc.*, Del. Super., CA. No. 93A-OI-002, n. 8 (1993) (*expressing the court's concern for any deviation from the administrative process as provided by law or participation in ex parte communications between one party and those charged with reviewing the merits for the State agency*). Moreover, conflict of interest statutes generally do not abrogate common law conflict of interest principles. 63C Am. Jur. 2d *Public Officers and Employees* § 253 (1997). Thus, the State Code is basically a codification of the common law restrictions which Delaware Courts have recognized as encompassing more than pecuniary interests.

Having determined that a private interest was more than just a financial interest, the Commission decided that the [organization]'s Board members had a personal interest, it was [the organization]. The organization had done an excellent job supporting [Entity 1]. Their patronage began when [Entity 1] was merely an idea and their monetary gift helped spur the establishment of [Entity 1]. They were an important aspect of [Entity 1]'s community. However, as is always the case when an individual tries to advance the goals of two closely associated entities, decisions about one entity are almost always made with an eye towards how it will affect the other.

[Entity 1]'s Bylaw requiring a majority of the [Entity 1] Board be [organization] members created a conflict of interest from the start. The Commission reiterated that [the organization] was a generous and supportive benefactor of [Entity 1]. However, the monetary gift given when [Entity 1] was first established, as well as the many volunteer hours donated, appeared to have created the impression among [the organization]'s members that they 'owned' [Entity 1]. There were many examples where it appeared that decisions regarding [the organization]'s interests were reviewed and disposed of by [Entity 1] Board members that were affiliated with [the organization]. For example:

- a. A decision was made to spend money on a video posted on [Entity 1]'s website that referred to [Entity 1] with the title of the [organization] preceding the name. Such labeling could lead people to believe that [Entity 1] is owned by [the organization], which it is not.

- b. The unwillingness of the [organization]-controlled Board to approve a change to the Bylaws which would have changed [the voting procedure for all] decisions related to [the organization].

- c. Approximately \$100,000 of [Entity 1]'s funds have been used for the benefit of [the pet project], a non-profit created by [the organization]. The [pet project's] board included two members of [Entity 1]'s board and a past president of the [Entity 1] Board.

- d. Non-[organization] Board members were selected by a three-person committee that was made up of one [organization] member and one member of [a sister group to the organization], giving those affiliated with an outside organization the majority vote. The decision to appoint two members of affiliated organizations to the Committee was made by those who were also affiliated with those organizations. As a result, the non-affiliated committee member could always be outvoted.

- e. [Member 1] referred to the Board's efforts to fill the empty buildings on [Entity 1]'s property as "tenant cultivation". The primary purpose of the Board, especially the President, is to attend to [Entity 1]'s business. Furthermore, the contracts related to the spending of [Entity 1] monies showed that the money was spent for the benefit of [the pet project] and thus, [the organization]. Website and [business] development did not qualify as necessary expenses to renovate a building for occupancy by any business.

- f. [Member 1] demonstrated his intention to create a paid position for former Board member, [Member 2], six days after [Member 2]'s term on the Board ended and then placed himself on the selection committee. [Member 1]

allowed [Member 2] to participate in discussions with a consultant who was creating a job description for the position for which he would subsequently apply. [Member 1]'s later actions, posting the job opening on multiple websites and interviewing candidates, appeared to be window dressing and did nothing to mitigate the fact that he had announced his intention to create a job for [Member 2] in July 2018. At the Commission meeting, [Member 1] alluded to the fact that [Member 2] was indeed selected to fill the administrative position. The third such position created in the past year. It was unclear whether [Member 1]'s professional judgment was affected by the fact that [Member 2] was a fellow [organization] member or because of his friendship with [Member 2] but in the end, it did not matter. His professional judgment had clearly been compromised by his association with [Member 2] and he should not have been a member of the Selection Committee.

When [Entity 1] accepted State funding, it became a State agency. If [the organization] had wanted to have complete control over [Entity 1], it should have been established as a private [business]. Because [Entity 1] is a State agency, its Board members are considered honorary state officials. 29 Del. C. § 5804(6). As a result, they must abide by the State Code of Conduct. Board members who also belonged to [the organization] had an inherent conflict of interest when voting on matters in which [organization] was involved. The current [organization]'s Board members demonstrated their inability to separate their fiduciary duty to [Entity 1] from their allegiance to [the organization].

2. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).

The purpose of the code is to insure that there is not only no actual violation, but also not even a “justifiable impression” of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. *See, e.g., Commission Op. No. 97-23 and 97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a “justifiable impression” that the Code is being violated by an official, while not “unduly circumscribing” their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

The appearance of impropriety was what sparked most of the outcry from parents and the request for an advisory opinion by [the Agency]. For example:

1. A non-[organization] affiliated Board member resigned in protest over what she believed was a biased Board.
2. Article(s) in the media have documented the dissatisfaction of [Entity 1]'s community.
3. During the pendency of the Commission's review of this matter, several people affiliated with [Entity 1] came forward to say that they have heard one or more of the [organization]'s Board members declare that “this is an [organization]

board”.

4. The “no confidence” vote by the [employee’s] union.
5. Creating a high-paying administrative position while allowing one of the prospective applicants to work on the job description. Also, a member of the selection committee was on the record stating he wanted to find a job for the presumed candidate.
6. The fact that a majority of the Board appeared to be tone deaf to the conflict of interest concerns voiced by the [Entity 1] community.

RECOMMENDATIONS

Consequently, the Commission recommended:

The Bylaws be changed so that [the organization]’s members or member’s of the sister group]] no longer represent a majority of the Board and that they must recuse themselves from voting on any matter which involves the [organization] or the [sister group of the organization]. The Board President could still be selected by [the organization] from among their designated Board members.

The nominating committee should be truly impartial and include no members of [the organization] or the [sister group of the organization].

The approximately \$108,000 (appropriated funds and remainder of the insurance proceeds) be repaid to [Entity 1] by either [the pet project’s board] or [the organization] before [the Agency stops monitoring Entity 1].

The administrators of [Entity 1] not be comprised of a majority of people who belong to the same outside organization. The ease with which [Entity 1]’s funds were converted to an unauthorized use was astonishing. Safeguards, such as assuring that no two administrators have a common private interest which may cause them to act contrary to their fiduciary duty to [Entity 1], should be implemented.

No [Entity 1] Board member could be a member of the [pet project’s] Board or vice-versa. [Entity 1] Board and staff could not work on [the pet] project.

Motion--The members of the [Entity 1] Board that were also associated with [the organization] violated the State Code of Conduct and [Entity 1]’s Bylaws on multiple occasions. The Commission’s decision was based on the fact that *multiple* decision-makers belonged to the *same* outside organization. The conflict perpetuated the appropriation of State funds that belonged to [Entity 1] by those who had a fiduciary duty to protect the interests of [Entity 1]. Immediate remuneration and remediation was required to correct the violations of the Code of Conduct. Moved—Commissioner Anderson; seconded—Commissioner Smith. Vote 4-0, approved.

******Commissioner Tobin returned to the meeting after his recusal******



STATE OF DELAWARE
DELAWARE STATE PUBLIC INTEGRITY COMMISSION

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VIA EMAIL

March 27, 2019

19-02--Personal or Private Interest (Waiver Granted)

Hearing and Decision By: *Bonnie Smith (Chair); William F. Tobin, Jr., (Vice-Chair); Michele Whetzel, (Vice-Chair); Commissioners: Andrew Manus; Jeremy Anderson, Esq.*

Dear Mr. Chesney,

Thank you for attending the March 19, 2019 Commission meeting. Once again, the Commission would like to extend its sincere apologies for your extremely long wait while the Commission considered the matter which was scheduled immediately preceding yours. Please also extend our apologies to your agency's Deputy Attorney General, Lawrence Lewis, who had to leave for a meeting before the Commission had the opportunity to meet him.

After consideration of all the relevant facts and circumstances, the Commission decided to grant your request for a waiver to allow you to contract with a vendor to place advertisements in the University of Delaware's game day program. The Commission's reasoning is set forth below. As a waiver was granted, this opinion will be published in its entirety so that the public will know that the Commission has reviewed and approved the matter.

I. FACTS

You are the Director of Communications for the Division of Small Business ("DSB") within the Department of State. Your Division was established in July 2017, to replace the Delaware Economic Development Office. As a new division, you are exploring ways to raise public awareness about the work of the DSB. Part of your State job duties includes locating and supervising outside vendors, including local and regional publications, to whom the DSB pays for advertising space. Your division has identified a key demographic group that is most likely to own a small business and you believe that one way to target that demographic is to buy ads in the University of Delaware's game day program. The cost of the ads you want to place are \$5,000, below the State threshold for public notice and bidding. Only one vendor, University Sports Publications ("USP"), sells ad space in the game day programs and their salesperson is someone with whom you have a long and close friendship. You recognized that your friendship

with the vendor's representative may create a conflict of interest with your State job duties and asked the Commission for an advisory opinion. If the Commission determined that your personal interest did violate the Code of Conduct's conflict of interest provision, you asked for a waiver to be allowed to contract with the vendor.

II. APPLICATION OF THE FACTS TO THE LAW

A. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).

A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter." 29 Del. C. § 5805(a)(1). As a matter of law, a person has a personal or private interest if any decision "with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent" than others similarly situated or if "the person or a close relative has a financial interest in a private enterprise which would be affected" by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as "close relatives" and "financial interest." 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

You do not have a conflict of interest as a matter of law because the salesperson is a friend, not a close relative. However, you have a conflict of interest as a matter of fact because the salesperson for USP is a close friend. You stated that you have known each other for over a decade and you were both members of the other's wedding party. Having established that you have a personal interest, your request to contract with USP would create a conflict of interest with your State job duties because you would be reviewing and disposing of matters in which you have a personal interest, namely a financial benefit to your friend's employer and a sales commission for your friend.

B. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23 and 97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a "justifiable impression" that the Code is being violated by an official, while not "unduly circumscribing" their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

Any member of the public aware of the close relationship between the buyer (you/the State) and seller (your friend/vendor) would likely be suspicious that your official duties were influenced by your friendship with the salesperson, regardless of the relatively small dollar amount of the contract. At the meeting you stated that you could recuse yourself from working with the vendor and ask one of your supervisors to handle the matter, but you added that it would be additional work on that person's workload. Although you have a conflict of interest, the Commission decided that your recusal was not necessary given the waiver granted below.

C. Waivers may be granted if there would be an undue hardship on the State employee or State agency, or the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).

(a) Undue Hardship 29 Del. C. § 5807(a)

A waiver may be granted if there is an "undue hardship" on the applicant or the agency. 29 Del. C. § 5807(a). "Undue" means "more than required" or is "excessive." *Commission Op. No. 97-18 (citing Merriam Webster's Collegiate Dictionary, p. 1290) (10th ed. 1992).*

USP is the sole source that provides advertising in the U of D's game day programs. Obviously, the DSB has an interest in advertising in Delaware so that it may reach Delaware residents interested in the services your Division provides. The Commission decided that the fact that USP is the only vendor providing the service you have identified as being beneficial to DSB's outreach efforts, qualifies as an undue hardship and has granted your request for a waiver. The waiver is for one year and the amount of money that can be paid to the vendor must not exceed the initial \$5,000 that was discussed at the meeting. If you and your Division decide that advertising in the game day programs was a successful marketing strategy and want to continue contracting with the vendor in the future, you should return to the Commission for further advice.

(b) Is literal application of the law necessary to serve the public purpose?

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. 29 Del. C. § 5802(1) and (2). The statute was designed to protect against these types of transactions and its enforcement is usually the best way to serve the public purpose. However, the relatively small dollar amount of the contract (\$5,000) and the length of the waiver (not to exceed one year) strikes a reasonable balance between the law's public purpose and the State's interest in growing a new division.

III. CONCLUSION

The DSB is granted a one year waiver of the conflict of interest provision in the Code of Conduct to allow you to oversee a contract with USP, for no more than \$5,000, to purchase advertising space in the U of D's game day programs.

Sincerely,

/s/ Bonnie Smith

Bonnie Smith
Chair

Motion in accordance with the foregoing. Moved—Commissioner Manus; seconded—Commissioner Anderson. Vote 5-0, approved.

******Commissioner Tobin left the meeting******

11. 19-14—Review of Comm. Op. 02-60

The Commission decided to pass this matter to the next meeting to allow additional time for review of pending regulations and any public comments that may be available.

Moved—Commissioner Anderson; seconded—Commissioner Manus. Vote 4-0, approved.

12. Motion to go out of Executive Session: Moved—Commissioner Whetzel; seconded—Commissioner Smith. Vote 4-0, approved.

13. Adjournment

ⁱ Pursuant to 29 Del. C. § 10004(6) to discuss non-public records (29 Del. C. § 10002(6) Any records specifically exempted from public disclosure by statute or common law), as the written statements required for advisory opinions and complaints are subject to the confidentiality standards in 29 Del. C. § 5805(f), 29 Del. C. § 5807(d) Advisory Opinion Requests, and 29 Del. C. § 5810(h) for Complaints. Further, the proceedings, like personnel actions are, by statute, closed unless the applicant for the advisory opinion requests a public meeting, 29 Del. C. § 5805(f), 29 Del. C. § 5807(d), or the person charged in a complaint requests a public meeting. 29 Del. C. § 5810(h). No applicant for an advisory opinion, nor a person charged by a complaint has requested an open meeting.